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IN THE

Supreme Court of the United States

..... Term A. D. 1966.

No. 1065

EDWARD H. SMALLEY,
Petitioner,

versus

SOUTHERN RAILWAY COMPANY,
Respondent.

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA.

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To the Honorable The Supreme Court of the United States of America:

Edward H. Smalley respectfully petitions this Honorable Court to rehear his petition to grant the writ of certiorari to the Court of Appeals of Georgia in the above cause.

In this behalf petitioner shows unto the Court:

I.

That his petition for certiorari was denied by this Honorable Court on April 18, 1966.

II.

GROUNDS FOR REHEARING.

Petitioner asks that the United States Supreme Court rehear his petition for a writ of certiorari

to the Court of Appeals of Georgia on the grounds that:

A. There have been intervening circumstances of a controlling effect, to-wit, two more federal court decisions holding that federal, not state law, applies to suits brought under the Federal Employers' Liability Act, and

B. On other substantial grounds available to petitioner although not previously presented, to-wit, authority that, although a new trial was granted, the Georgia Court of Appeals' decision was a final judgment.

III.

This Petition for Rehearing is presented in good faith and not for delay and the same is restricted to the grounds above specified.

IV.

Petitoner's Petition for a Writ of Certiorari to the Court of Appeals of Georgia was based on the Georgia Court of Appeals' erroneous interpretation of federal laws. Said intepretation, as was pointed out in said petition, was contrary to the controlling federal decisions. This Court has hundreds of times held that decisions in cases under the Federal Employers' Liability Act must be uniform. If the decision of the Court of Appeals of Georgia (R. 679) is not reviewed and reversed by this Court, it will cause a break in the chain of uniformity.

CONCLUSION.

WHEREFORE, petitioner prays that his Petition for Rehearing be considered; that his Petition for Writ of Certiorari to the Court of Appeals of Georgia be granted, and the opinion of the court below reversed.

Respectfully submitted,

THOMAS J. LEWIS, JR.,
Attorney for Petitioner.

905-910 Healey Building,
Atlanta, Georgia 30303.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THIS PETITION FOR REHEARING.

Point 1.

Subsequent to the date petitioner's Petition for Certiorari was filed, the Fourth Circuit Court of Appeals in *Giddens v. Isbrandtsen Co.*, 355 F. 2d 125, in a Jones Act case, (46 U.S.C.A., §688) has added one more case to the long list of cases holding that federal and not state rules of law apply in that type of action, and, of course, the Jones Act was fashioned from the Federal Employers' Liability Act (45 U.S.C., §§ 51-60). Circuit Judge Bryan held in that case:

> "The Virginia statute, we think, is not so closely related to the question as to be a significant factor. *Giddens does not sue on a cause of action afforded by Virginia common law or statute. His suit is pitched exclusively on maritime law, as granting him recourse against the shipowner. . .*" [Emphasis added.]

Later, in the same opinion:

> *". . . Also, the Jones Act is of national application, thus providing a uniform criterion wherever in the United States maritime responsibilities are to be enforced."* [Emphasis added.]

The District Judge in the *Giddens* case did exactly what the Georgia Court of Appeals has done in the instant case, i.e., held that the state two-year statute of limitations could be applied rather than the federal

three-year statute of limitations and, as above stated, the United States Court of Appeals reversed.

Subsequent to the date petitioner's Petition for Certiorari was filed, the United States Court of Appeals for the Fifth District rendered a decision in *Porter Admnx. v. St. Louis San Francisco Railway Company*, 354 F. 2d 840, a suit brought under the Federal Employers' Liability Act which, in addition to the decisions cited in Smalley's Petition for Certiorari, is further authority for this Court to vacate its denial of the Petition for Writ of Certiorari and grant the writ and reverse the Court of Appeals of Georgia.

Senior District Judge Sloan in the *Porter* case stated:

> "Plaintiff brought her cause of action against the defendant Frisco alleging that the Federal Employers' Liability Act was the applicable law, basing the state court's jurisdiction thereon and seeking recovery against the defendant Frisco for alleged negligence of said defendant. . . . defendant Frisco . . . filed in the United States Court for the Western Division of the Northern District of Mississippi a petition for the removal of said cause to said United States District Court. Thereafter, plaintiff filed a timely motion to remand said cause to the circuit court of Marshall County, Mississippi. . . . the district judge entered a memorandum opinion and order overruling plaintiff's motion to remand.

"The case came on for hearing on the merits in the United States District Court for the Northern District of Mississippi . . . After the jury was empanelled counsel for defendant objected to the argument on the ground that the Court had already ruled on the plaintiff's motion to remand, holding that plaintiff's intestate was not an employee of the defendant as contemplated by § 51 of the Federal Employers' Liability Act and that for that reason the trial could not proceed and evidence be produced under the Federal Employers' Liability Act and that the only right plaintiff-appellant had, if any, *was to proceed under the common law of the State of Tennessee.* This motion or objection was sustained by the Court." [Emphasis added.]

Further, in this opinion, Judge Sloan wrote:

"In an action brought under the Federal Employers' Liability Act the defendant railroad sought removal and on the motion to remand the Court said:

"'By the federal act jurisdiction to adjudicate causes of action arising thereunder is conferred upon the state courts concurrently with the federal courts, and the defendant is denied the right of removal from one to the other. In good faith the plaintiff here went into the state court, unequivocally declaring that she sought a recovery under the act.

"'It may be a fair question whether in her pleading she states facts sufficient to entitle

> her to recover, but, having the right to select the tribunal to which she would submit her claim, she should have this question, as well as all others, decided by the court whose jurisdiction she has invoked.' *Smith v. Camas Prarie Ry. Co.*, 216 Fed. 799, 801."

The Fifth Circuit Court of Appeals reversed the district court and remanded the cause to the circuit court of Marshall County, Mississippi.

The district court in the *Porter* case held that state, not federal laws, applied. It was reversed. The Georgia Court of Appeals has held that state law defenses should be allowed in the Smalley case. This, likewise, should be reversed.

If the Georgia Court of Appeals' decision is allowed to stand, Smalley will be required to have his case tried once again with the possibility of being defeated on the strength of state law defenses which the Court of Appeals in its opinion has erroneously held are proper defenses to a suit under the Federal Employers' Liability Act.

Point 2.

Respondent, Southern Railway Company, in its brief in oppostion to the petition for writ of certiorari argued at length that "there is no final judgment subject to review in this Court." That, under Title 28, U. S. C., §1257, this Court's jurisdiction to review decisions of State Courts extends only to final judgments; that the judgment of the Georgia Court of

Appeals was not a final judgment within the meaning of that section.

Petitioner inadvertently failed to include in his petition for writ of certiorari the very important case of *N. E. Pope, et al. vs. Atlantic Coast Line Railroad Company*, 73 S. Ct. 749, 345 U. S. 379, 97 L. Ed. 1094. This was also a case coming to the United States Supreme Court from the appellate courts of Georgia. The same argument was made by respondent in that case as by the respondent in the case at bar, i.e., that there was no final judgment subject to review in the United States Supreme Court under Title 28, U. S. C., §1257. In the *Pope* case respondent argued that there was no final judgment because petitioner Pope could still go back to Ben Hill County for a trial on the merits of his case. (Petitioner Smalley can go back to Cobb County, Georgia, for a second trial on the merits of his case.)

> "... Mr. Justice Frankfurter, speaking for the majority in *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 S. Ct. 972, 92 L. Ed. 1212, termed the dividing line between final judgments and nonfinal judgments 'faint and faltering at times' ... 'No self-enforcing formula defining when a judgment is 'final' can be devised."

But, unlike the judgment before the Court in that case, the judgment of the Court of Appeals of Georgia has decided conclusively for Georgia and for Smalley the very important question of law in the case and that question is a federal question related to federal statutes. There is no possibility that any

additional trials of the Smalley case will generate additional federal questions. A decision by this Court on Smalley's petition for a writ of certiorari would conclude the case once and for all. To deny review now and send the case back to the trial court for another lengthy and expensive trial would serve no useful purpose but, on the contrary, would unnecessarily prolong this litigation. Should the denial by this Court of Smalley's petition for writ of certiorari not be reviewed, withdrawn, and the writ granted, this case must be tried once again with the possibility of starting the spiral appellate procedure once again.

In the *Pope* case Mr. Justice Vinson, delivering the opinion, commented on "piecemeal procedures." Unless the opinion of the Court of Appeals of Georgia is reversed, "piecemeal proceedings" will be the result in the Smalley case. Mr. Justice Vinson in the opinion of the Court states:

> "The finality problem arises in this case because the judgment of the Georgia Supreme Court did not, on its face, end the litigation. Both parties agree that Georgia procedure would permit petitioner to return to the Superior Court of Ben Hill County and interpose some other defense to respondent's suit for an injunction. But petitioner has no other defense to interpose. He has been both explicit and free with his concession that his case rests upon his federal claim and nothing more. If the court below decided that claim correctly, then nothing remains to be done but the mechanical entry of judgment by the trial court. Thus, as the case comes to us, the

federal question is the controlling question; 'there is nothing more to be decided.' Under these particular circumstances, we have jurisdiction over the cause, *Richfield Oil Corp. v. State Board*, 329 U. S. 69 (1946); and we reach the merits of petitioner's contention that the Georgia Supreme Court has failed to give proper effect to the venue provisions of the Federal Employers' Liability Act."

If this Court refuses on this petition for rehearing to grant petitioner's petition for a writ of certiorari to the Court of Appeals of Georgia, the opinion of the Court of Appeals of Georgia will be in conflict with the *Pope* case and cases cited therein in addition to being in conflict with all of the cases cited in the petition for certiorari, and will break the chain of uniformity.

Respectfully submitted,

THOMAS J. LEWIS, JR.,
Attorney for Petitioner.

905-10 Healey Building,
Atlanta, Georgia 30303.

Personally appeared before the undersigned officer, duly authorized by law to administer oaths, Thomas J. Lewis, Jr., who, after first being duly sworn, deposes and says that the within petition for rehearing and brief in support thereof are submitted in good faith and not for the purpose of delay. He further certifies that the petition is restricted to grounds which are confined to circumstances inter-

vening between the filing of his petition for certiorari and this Court's denial of said petition, and substantial grounds which were available to petitioner although, inadvertently, not previously presented.

THOMAS J. LEWIS, JR.

Sworn to and subscribed before me this 21st day of April, 1966.

JANET TORBERT,
(Seal) Notary Public, Georgia
State at Large.

My Commission Expires Feb. 29, 1970.

CERTIFICATE OF SERVICE.

This is to certify that I have this day served Mr. Stanley L. Temko, 701 Union Trust Building, Washington, D.C. 20005, Mr. Charles J. Bloch, 710 Walnut Street Building, Macon, Georgia, and Mr. John W. Maddox, P. O. Box 29, Rome, Georgia, Attorneys for Respondent, with copies of Petition for Rehearing in the above-stated case by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This .... day of....., 1966.

THOMAS J. LEWIS, JR.,
Attorney for Petitioner.